IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 21 of 2003

WITH

CRIMINAL APPEAL No 830 0f 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PARTY IN APPEAL NO. 21 of 2003

KALSING JITHRA KALASVA
Versus
STATE OF GUJARAT

PARTY IN APPEAL No. 830 of 2002
KALU HARSING MONIA
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 21 of 2003
MR G RAMAKRISHNAN for Appellant
MR HL JANI, APP for respondent State

2. Criminal Appeal No. 830 of 2002
MS SADHANA SAGAR for Appellant
MR HL JANI, APP for respondent State

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 17/09/2004

COMMON ORAL JUDGEMENT

1. Both the appellants were accused of Sessions Cases No. 109/1997. 95/2000, 96/2000 and 86 of 2001 of the Court of Sessions Judge at Valsad. They have preferred both these Appeals under Section 374(2) of the Criminal Procedure Code against judgment and order dated 25th of September, 2002, delivered by learned Additional Sessions Judge, Valsad, in the said Sessions Cases, convicting both the appellants and sentencing appellant Kalu Harsing Monia and appellant Kalsing Jithra Kalaswa for the charges levelled against them under Sections 452, 457, 395, 397, 504 and 114 of the Indian Penal Code. Both the appellants were sentenced for the rigorous imprisonment of 7 years for the charges proved against them under Section 397 of the Indian Penal Code and each of them was fined to pay Rs.2,000/- in default to undergo simple imprisonment of three months. For the charges levelled against them under Sections 452, 395, 504 and 114 of the IPC, they were not inflicted separate sentences by the learned Additional Sessions Judge, Valsad.

2. First informant i.e. Nikunjben Ashoksinh Mahida, residing at Palihill Bungalow No. 81, Saikrupa, Tithal Road, Valsad, lodged her complaint on 20th of May, 1996, before City Police Sub-Inspector, Valsad City. Accordingly, along with her family, consisting her husband and two sons, they were residing at the above address at Valsad. Her husband Ashoksinh Takhatsinh Mahida was serving as Customs Inspector at Sahara Airport and was commuting from Bombay to Valsad for his job. One son named as Harpalsinh was studying in Standard - 12 while the other son named as Siddharth was studying in Standard-10. On 19th of May, 1996, at about 3'O clock in the afternoon, Ashoksinh, husband of Nikunjben, returned to Valsad from his job and thereafter they took their supper and watched TV till 10.30 at night. Ashoksinh and her wife Nikunjben were sleeping in the ground floor while their both sons went to upstairs for sleeping. At about 1.30 hours on 20th of May, 1996, Nikunjben heard

some noises on back door of her house. This noise awakened the couple. They switched on the light of their room and Ashoksinh took a stick and both of them thereafter went in the back portion of the house to verify about the noises. Hearing this disturbance, Harpal, son of Nikunjben, also got down with a stick. Nikunjben was requested by her son to go to upstairs and, therefore, she went to upstairs and raised shouts. She saw two persons standing in front of her house near the telephone pole. In the meantime, after breaking the glass of the window and breaking open the back door of the house, some 10 to 12 persons rushed in the house. Ashoksinh attempted to accost those persons with the stick, but the said persons had forcibly entered into their house and inflicted a blow of stick on the head of Ashoksinh. Due to this injury, Ashoksinh had fallen on the ground. He called his son out of the house and warned him to protect himself. The persons who were robbers, were abusing and using filthy language. One of the person also inflicted stick blow on the hand of Nikunjben. The persons were scuffling with Ashoksinh at parking place. Thereafter the said persons, who had entered in the house, had broken up cupboards and looted away gold ornaments and cash amount. Neighour Rameshbhai Somnath Mehta also on being awakened by this commotion, came to their house, and one of the robbers inflicted a blow of stick to him also. They were speaking Gujarati language and out of those robbers, some of them wore lungi while others were in half pant. This incident continued for about 30 minutes and the complainant and his family were robbed of golden ornaments amounting to Rs. 23,000/- and cash of Rs. 2,000/-. The complaint came to be recorded before Police Inspector R.M. Chauhan and investigation was handed over to Police Inspector Jeriwala, who drew panchnama of scene of offence and recorded the statements. Thereafter, from 3rd of June, 1996, Jayshankar Ganapatlal Mehta took over the investigation and accused (1) Paru Kanji, (2) Paru Hunsing, (3) Nathu Jithra and (4) Ramsing Damor were came to be arrested because they were arrested by Bharuch Police and there from they were taken into custody in this offence. They show the place of offence in the presence of panchas. Accused Parsing thereafter was arrested on 10th of September, 1996. Test identification parade was held by Executive Magistrate on 11.9.996, and this five accused, wherein they were identified by the witnesses. Discovery panchnama was also prepared and charge sheet came to be filed against this five accused. Accused Virsinh Kanji was arrested on 28.10.1998 and accused Thalsing Jithra and Narsing Rupta also were arrested on 30.10.1998, and in an identification parade

held on 3rd of November, 1998 these three accused were identified by the witnesses, in the presence of panchas and Executive Magistrate. On 23.1.1999, again a further charge sheet was submitted against these three accused. Thereafter, accused Babu Parsing was arrested and accused Heman Tidiya was arrested on 6th of October, 2000, and a charge sheet came to be submitted against this accused also. Originally, there were 11 accused, against whom four charge sheets at different times were submitted by the Police. Appellant Kalsing Jithra Kalaswa was arrested on 30.10.1998. He was committed for trial and was accused in Sessions Case No.339/2002. While appellant Kalu Karsing Monia was arrested on 3.9.96 and was committed for trial and was accused in Sessions Case No.123 of 2002. All the 11 accused were arrested in same crime. All 4 Sessions cases were tried together by the Trial Court and were disposed of by common judgment.

3. Vide Exh. 5, learned Additional Sessions Judge, Valsad, on 31st of May, 2000 framed charges against accused Parubhai Kanjibhai, Kalu Harsing, Ramsinh Narsinh Damor and Nathu Jithra Damor and they pleaded not guilty. Again vide Exh. 14 a charge was framed against all the 11 accused by learned Additional Sessions Judge, Valsad, on 2nd of August 2001 after receiving additional charge sheets and all the accused pleaded not guilty.

4. The prosecution examined as many as 20 witnesses as under:

(1) Nikunjben Ashoksinh Mahida, PW-1 Exh.31,
(2) Ashoksinh Takhatsinh Mahida, PW-2 Exh.36,
(3) Rameshbhai Somnath Mehta, PW-3 Exh.38,
(4) Harpalsinh Ashoksinh, PW-4 Exh.39,
(5) Dharmeshkumar Manubhai Desai, PW-5 Exh.42,
(6) Kaushikbhai Venilal Gheewala, PW-6 Exh.44,
(7) Digambar Yashwantry, PW-7 Exh.46,
(8) Lalitprasad Chorasia, PW-8 Exh.47,
(9) Bachubhai Bodibhai Kukna, PW-9, Exh.49,
(10) Abdul Rahim A Shaikh, PW-10, Exh.51,
(11) Fatesinh Madhubhai Choudhari, PW-11 Exh.55,
(12) Rajnikant Shivlal Panchal, PW-12 Exh. 58,
(13) Rajanikant Shivlal Panchal, PW-13 Exh. 60,
(14) Sanjaykumar Changalal Patel, PW-14 Exh. 61,
(15) Maheshbhai Jayantibhai, PW-15 Exh.63,
(16) Uttambhai Bandubhai, PW-16, Exh.65,
(17) Mansoor Ali Shaikh PW-17 Exh.66,
(18) Dineshbhai Maheshchandra Gupta PW-18 Exh.67,
(19) Ranchhodbhai Babubhai, PW-19 Exh. 68 and
(20) Jayshankar Ganpatlal Mehta, PW-20 Exh. 71.

The prosecution has also produced the following documents:

Complaint at Exh. 33, Panchnama of scene of incident at Exh.43 and 45, panchnama at Exh. 59, panchnama of muddamal seized at Exh.48, panchnama of scene of offence shown by accused at Exh. 62, panchnama of identification of muddamal at Exh.50, panchnama of scene of offence shown by accused at Exhs. 64 and 72, medical certificate of PW-4 Harpalsinh at Exh-27, medical certificate of PW-3 Ashokbhai Mahida, PW-2 at Exh.28, medical certificate of Harpalsinh PW-4 at Exh. 30, panchnama of scene of offence shown by accused at Exh. 73, panchnama of identification parade at Exh.53 and 54.

5. After the evidence was over, the statement under Section 313 was recorded of each of the accused wherein they denied the charges in toto and stated that the evidence was fabricated against them and was false. They were asked for any explanation if they intend to make about the evidence, but they stated that a false case was filed against them.

6. After hearing the learned counsels for the parties, the learned Additional Sessions Judge convicted all the accused as above said and hence these Appeals.

7. Out of 11 accused, only two accused have filed appeals i.e. original accused No.2 Kalu Harsing Monia has filed Criminal Appeal No. 830 of 2002 through jail and in the said Appeal learned Advocate Ms. Sadhana Sagar was heard at length, while original accused No.7 Kalsing Jithra Kalaswa has preferred Criminal Appeal No. 21 of 2003 through jail and in the said Appeal learned Advocate Mr G.Ramakrishnan appointed to assist the accused was heard at length.

8. Learned APP Mr. H.L. Jani in both the Appeals for the State was also heard.

9. Both the learned counsels for the appellants restricted their arguments to the extent of the quantum of punishment and did not address this Court about the merits of the Appeals and the judgment and order of conviction impugned.

10. However, going through the evidence, it appears that the injured witnesses PW-1 Nikunjben Ashoksinh Mahida Exh.31, PW-2 Ashoksinh Takhatsinh Mahida at Exh. 36. PW-4 Harpalsinh Ashoksinh Mahida at Exh. 39, make it clear that the incident occurred as has been stated in

complaint at Exh-33. Three injury certificates produced on record at Exh.27, at Exh.28 and Exh. 30 makes it amply clear that they were injured witnesses and their evidence on appreciation is found reliable. During two identification parades, all the accused including present appellants were identified in the presence of panchas. This reliable evidence proved beyond reasonable doubt about the participation of the accused in the crime including present appellants. The evidence of PW-10 Exh.51 Abdul Rahim Shaikh, Executive Magistrate who conducted test identification parade on 11th of September, 1996 is beyond any taint. Likewise, the test identification parade which was conducted on 3rd of November, 1998 is also found absolutely creditworthy through the evidence of PW-11 Fatesinh Madhubhai Choudhari at Exh. 55 wherein the accused came to be identified. Going through the evidence of injured witnesses and the evidence of two Executive Magistrates who conducted identification parades, even examining the case dispassionately, this Court does not find any error in appreciating the evidence by the trial court to come to the conclusion that the accused including the present appellants were guilty of the charges levelled against them.

11. Though both the learned Advocates for the appellants have restricted their arguments for the quantum of punishment. In this respect, it is pertinent to note that the appellant in Criminal Appeal No. 830 of 2002 Kalu Harsing Monia has already undergone the sentence awarded to him by the learned Sessions Judge. This is evident from the letter addressed by Jailor, Central Jail to the learned APP and the said letter is dated 15th of September, 2004, which is taken on record. Thus, so far as Appeal filed by accused Kalu Harsing Monia, appellant of Criminal Appeal No. 830 of 2002 is concerned, the Appeal becomes infructuous and the question of consideration of quantum of sentence does not arise. While appeal preferred by Kalsing Jithra Kalaswa i.e. Criminal Appeal No. 21 of 2003 is concerned, from the recent jail record, which is taken on record, as produced by learned APP, it is clear that Kalsing Jithra Kalaswa has undergone imprisonment of 6 years 4 months and 16 days including remission of six months and five days. He is convicted by the learned trial Judge for 7 years rigorous imprisonment and fine of Rs. 3,000/- in default to undergo simple imprisonment of four months. It clearly appears that the major portion of the substantive sentence inflicted on Kalsing Jithra Kalaswa has already been undergone by him, as aforesaid. In these circumstances, learned Advocate Mr. Ramakrishnan

urges that the sentences be reduced to the extent of undergone, having regard to the age of accused - appellant - Kalsing Jithra Kalaswa who is only 39 years at present and that he has to maintain his family.

12. The object of punishment is deterrent, reformative and retributive. Punishment serves a purpose inasmuch as it acts deterrent for those who have propensity to commit such offences. While inflicting punishment, two objectives i.e. (i) punishing the criminal not to repeat the crime, and (ii) attempt to reform him to be a respectable member of the society must be taken into consideration. Having regard to the facts and circumstances of this case, while the accused appellant Kalsing Jithra Kalaswa has undergone 90% of the sentence awarded to him, to give a chance to reform him, the request made by learned Advocate for the appellant is worthy to consider reduction of sentence to meet the end of justice. When out of 7 years substantive sentence of imprisonment, he has already undergone, imprisonment of six years 4 months and 16 days, it would be in the interest of justice to reduce the sentence of appellant Kalsing Jithra Kalaswa to the extent he has already undergone and to set him at liberty. It is hoped that this will provide him an opportunity to reform himself. In this view of the matter, the following order is passed.

" Criminal Appeal No.830 of 2002 filed by appellant - accused Kalu Harsing Monia stands disposed as having become infructuous in view of the fact that he has already undergone the sentence awarded to him.

Criminal Appeal No.21 of 2003 filed by appellant - accused Kalsing Jithra Kalaswa is allowed to the extent that while maintaining the conviction, sentence awarded to him by the learned Trial Judge for rigorous imprisonment of 7 years and to pay the fine of Rs. 2,000/- in default to undergo SI for three months, is reduced and modified to the extent that the appellant accused is sentenced to the imprisonment which he has already undergone which comes to about 6 years 4 months and 16 days. Except this modification in quantum of sentence, as indicated above, rest of the Appeal of appellant - Kalsing Jithra Kalaswa shall stand dismissed.

Accused - appellant Kalsing Jithra

Kalaswa is directed to be set at liberty forthwith if he is not required to be detained in jail for any other purpose.

Mudammal to be disposed of as directed by the learned Trial Judge."

(J.R. Vora, J.)

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